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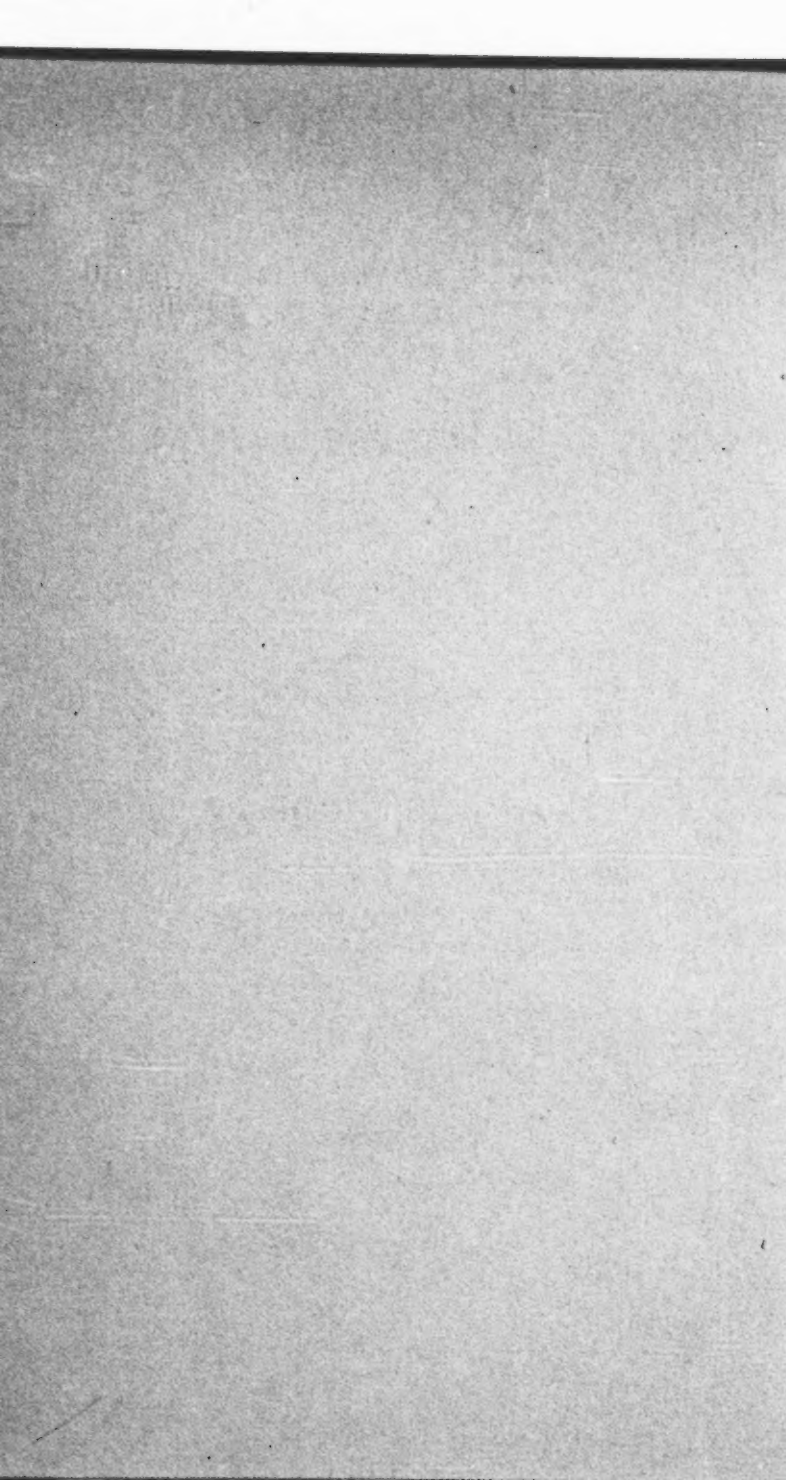
In the
Supreme Court of the United States.
October Term, 1922.

TIDAL OIL COMPANY AND ELEANOR ARNOLD,
Petitioners,
VERSUS
J. P. FLANAGAN, *Respondent.*

BRIEF OF RESPONDENT.

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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1922.

No.

TIDAL OIL COMPANY AND ELEANOR ARNOLD,
Petitioners,

vs.

J. P. FLANAGAN, *Respondent.*

BRIEF *of* RESPONDENT.

The petition for a writ of *certiorari* herein is apparently founded upon the last clause of section 237 of the Judicial Code, as amended by Act of Congress of December 23, 1914, chapter 2, and the Act of Congress of September 6, 1916, chapter 448, section 2, by the provisions of which where any title, right, privilege or immunity is claimed under the Constitution or a statute of the United States, and the decision is either in favor of or against such right, title, privilege or immunity especially set up or claimed under such constitution or statute, it is

competent by *certiorari* for this court to require there be certified to it for review and determination any such cause, where any final judgment or decree has been rendered or passed by the highest court of the state in which such decision could be had, as there is no contention made either in the petition for *certiorari*, or in the brief in support thereof, that the *validity* of any statute or any authority exercised under the United States was drawn in question; nor the *validity* of any statute or authority exercised under any state within the principles laid down by this court with reference to the construction of the word “authority” in *Telluride Power Co. v. Rio Grande R. Co.*, 175 U. S. 639, 44 L. ed. 305.

This is also made more apparent by virtue of the decision of this court in *Philadelphia & R. Coal Co. v. Gilbert*, 245 U. S. 162, 62 L. ed. 221, wherein it was held that a decision of the highest court of a state passing upon the jurisdiction of a trial court of such state was not reviewable in the Supreme Court of the United States by writ of error, as there was not drawn in question “an authority exercised under the state” for the reason that the power to hear and decide cases in the state courts is not the kind of “authority” to which the statute governing such appeals refers, and that therefore *certiorari* under the last clause of section 237 of the Judicial Code was the only remedy of a party desiring a review of such decision in the Supreme Court of the United States.

The issues made by the pleadings and as passed upon by the Supreme Court of Oklahoma briefly stated, were as follows:

First. The plaintiff pleaded an action to quiet title under the law and practice in the courts of Oklahoma.

Second. The defendants below (petitioners herein) pleaded the defense of *res adjudicata*, setting up the prior judgment of the District Court of Creek County, Oklahoma, and two orders of the County Court of Creek County, Oklahoma (being the court having probate jurisdiction in Oklahoma), approving and confirming contracts of ratification made by the respective guardians of the minor allottee, Robert Marshall, and also estoppel by virtue of the alleged receipt of one-fourth of the royalty during the year 1916 by the plaintiff below (respondent herein). The petitioner, Tidal Oil Company (one of the defendants below), only claimed an interest in said land by virtue of being the assignee of the alleged oil and gas mining leases, acquiring its interest by assignments in July and August, 1915, and five (5) years after the judgment of said District Court, and two (2) years after the order of the County Court approving the contract of the first guardian; the second order of the County Court approving the contract of the second guardian having been made upon application of and after Tidal Oil Company had purchased said leases from the alleged lessees.

No statute of the United States and no constitutional provision thereof was pleaded by any party in the trial court, or in the motion for new trial filed by defendants in said court (petitioners herein), but assignment Number VI filed in the Supreme Court of Oklahoma alleges:

“VI. The judgment and decree of the court, by divesting the Tidal Oil Company of its rights and title acquired under the judgment of the District Court of Creek County, and the judgment and order of the County Court of Creek County, each having jurisdiction in the premises, amount to, and the enforcement thereof constitutes, a taking of property without due process of law, and in violation of the Constitution of the United States and of the State of Oklahoma.”

It therefore appears to us that the main question for decision by the Supreme Court of Oklahoma was whether or not the judgment of the District Court of Creek County, Oklahoma, pleaded by the defendants below (petitioners herein) constituted a valid defense of *res adjudicata* between the parties hereto, all of whom are grantees or assignees of the parties to said judgment in said court.

The other question submitted to the Supreme Court of Oklahoma under the above mentioned assignment of error was whether or not Tidal Oil Company acquired such a vested right or title by virtue of the judgment of said District Court of Creek County, Oklahoma, and the orders of confirmation

and ratification by the County Court of Creek County, that the decision of the Supreme Court of Oklahoma in this case and in the other cases cited in its opinion changed a "rule of property" in said state so as to deprive said Tidal Oil Company (one of the petitioners herein) of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

This court held in *Phoenix Fire Insurance Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 670:

"The decision of the Supreme Court of a state as to the weight to be given to the judgment of a court of that state is not reviewable in this court because it is not a federal question."

Likewise, in *Smalley v. Laugenor*, 196 U. S. 93, 49 L. ed. 401.

With reference to the "rule of property" doctrine, this court said, in *Gannon v. Johnston*, 243 U. S. 108, 61 L. ed. 622, as follows:

"A contention that many investments have been made upon a construction of law differing from that given in this case by the Supreme Court of Oklahoma and that such construction and common understanding of the bar have operated to establish a rule of property which cannot be changed, was denied by the Supreme Court of Oklahoma and rightly so. The matters relied on were inadequate to overcome the meaning of the statutory provisions in question."

We are unable to see where there is any such rule of property involved in this case as a basis for

the claim that the rights of the petitioners were taken away in violation of the United States Constitution for the following reasons:

First. The determination of the jurisdiction of the District Court of Creek County, Oklahoma, is not overturning a rule of property because the decision of that court was merely that of a trial court and not of the highest court of the state adjudging the law of the state with reference to rights of property.

Second. The decisions relied upon by the petitioners, to-wit, *Markham v. Dugger*, 34 Okla. 492, 126 Pac. 190, and *Wiley v. Edmonson*, 43 Okla. 1, 133 Pac. 38, were not decisions establishing rules of property by the Supreme Court of Oklahoma, but merely deciding the effect of prior judgments between the parties to cases in which such judgments were rendered—merely determining whether or not the plea of *res adjudicata* was a good plea between the parties in the subsequent suits between the same parties.

Third. The case of *Bell v. Fitzpatrick*, 53 Okla. 574, 157 Pac. 334, did not announce a rule of property overruling *Markham v. Dugger* and *Wiley v. Edmonson*, *supra*, but merely reiterated the principle announced by the Supreme Court of Oklahoma in *Jefferson v. Winkler* (July 12, 1910), 26 Okla. 653, 110 Pac. 755, which was decided several years prior to the time Tidal Oil Company acquired any interest as lessee in the real property in controversy herein. In the case of *Jefferson v. Winkler*, the Supreme Court of Oklahoma said:

"That the allotted lands of freedmen and mixed-blood Indians having less than half Indian blood, under the age of 18, if a female, and under the age of 21, if a male, may be sold under the supervision and jurisdiction of the probate courts of the state, and not otherwise."

With reference to the fourth contention of the petitioners set forth in their petition for *certiorari* herein, concerning the case of *Winona v. Barnes*, 83 Okla. 248, 200 Pac. 981, that the application of the principles decided by the Supreme Court of Oklahoma in that case deprives Tidal Oil Company of its vested rights and impairs the obligations of its contract, we think the statement of the Supreme Court of Oklahoma in the case at bar is sufficient answer, wherein it said:

"Our attention has not been directed to any statute authorizing the making of such compromise agreements as the record discloses were entered into in the instant case * * * Parties in dealing with restricted Indians with respect to restricted allotted lands will not be permitted to secure conveyances in violation of applicable statutes prescribing the manner in which said land may be alienated and then institute litigation and make compromise agreements with reference to such fraudulent and void transactions in furtherance of a scheme to acquire title to such lands in a manner not authorized by law. Such course of conduct, if sanctioned by the courts, would permit parties with impunity to defeat the very purpose of legislation enacted by Congress for the protection of such Indian allotments."

Stated in concise form the contentions of petitioners which attempt to present a federal question may be reduced to two propositions:

1. That the validity of the deed and leases under which petitioners claim had been adjudged valid in prior litigation between Marshall, the allottee, and Arnold and associates, grantees in Marshall's conveyance and lessors in the oil and gas leases under which petitioners claim, and by the orders of the County Court of Creek County approving said leases.

2. That by former decisions of the Supreme Court of Oklahoma judgments of the District Courts of Oklahoma rendered in actions involving possession of allotted lands of members of Indian Tribes were held to be a valid exercise of jurisdiction by such court, and that the rule announced by the Supreme Court of Oklahoma in *Bell v. Fitzpatrick*, 53 Okla. 574, 157 Pac. 334, and in this case, constituted a change in rule of decision by said court and deprived petitioners of their property without due process of law and impaired the obligations of their oil and gas mining lease.

In *Markham v. Dugger*, 34 Okla. 492, 126 Pac. 190, and in *Wiley v. Edmonson*, 43 Okla. 1, 133 Pac. 38, the Supreme Court of Oklahoma held that a judgment in an ejectment action involving the land of members of the Indian Tribes were valid judgments and were a bar to a subsequent action between the same parties for the same subject-matter. These are the decisions of the Supreme Court of Oklahoma

which, in effect, it is contended had established a rule of property upon which petitioners relied, and which rule of property and rule of decision was subsequently changed in *Bell v. Fitzpatrick*, *supra*, and in this case. The decisions in *Markham v. Dugger*, and in *Wiley v. Edmonson*, *supra*, were confined solely to the question of whether the former judgment could be urged as a bar in a subsequent action and did not undertake to adjudge the validity of the muniments of title relied upon by either party to the litigation in those actions.

The right of a state to determine the extent and limits of the jurisdiction of its own courts and the character of the controversies which shall be heard therein, the mode and time of invoking that jurisdiction and the rules of practice to be observed in its exercise, is a matter of local law.

—*Chambers v. B. & O. Ry. Co.*, 207 U. S. 142,
52 L. ed. 143;

John v. Paullin, 231 U. S. 583, 58 L. ed. 381;

St. L. I. M. & S. Ry. Co. v. Taylor, 210 U. S.
281, 52 L. ed. 1060.

Decisions determining the effect of a judgment of a state court as *res adjudicata* between the parties is a very different proposition from a rule of decision determining the manner in which title to property may pass from one person to another, or affirming the validity of a conveyance of property made under certain circumstances.

Decisions of the highest court of a state which amount to rules of property that will be recognized by this court, whether founded on statutes or not, are decisions which announce rules governing the descent, transfer or sale of property and the rules which affect the title and possession thereto.

—*Bucher v. Cheshire R. Co.*, 8 Sup. Ct. 974,
125 U. S. 555, 31 L. ed. 795;

Randolph v. Quidnick Co., 10 Sup. Ct. 655,
135 U. S. 457, 34 L. ed. 200;

DeVaughn v. Hutchinson, 17 Sup. Ct. 461,
165 U. S. 566, 41 L. ed. 827.

The seventh contention that the judgment of the Supreme Court of Oklahoma was not supported by the evidence is answered by the opinion of that court in the case, wherein it is stated that petitioners admitted in the state court that Marshall, the allottee, had been restored to competency prior to the execution of the quit claim deed of October 13, 1916. There is, therefore, no merit in this contention.

The Supreme Court of Oklahoma has never by any decision, so far as we know, announced the rule that a conveyance by deed or alienation of an interest by an oil and gas lease of the lands of a restricted Indian minor made in violation of the various Acts of Congress, as were the deed and leases in question in this case, is valid, but on the contrary has uniformly held that such attempts to alienate or encumber the lands of a minor citizen of either of the Five Civilized Tribes were absolutely void.

An examination of the decision of the Supreme Court of Oklahoma in this suit will disclose that all questions, with one possible exception, passed upon and decided by said court, were non-federal, and governed by the laws and public policies of the State of Oklahoma, as follows:

First. The court passed upon the right of the plaintiff below (respondent herein) to maintain such action under the laws of Oklahoma.

Second. The effect to be given to the quitclaim deed executed by the allottee on October 13, 1916, to the plaintiff, under and by virtue of the laws of Oklahoma.

Third. The jurisdiction of the District Court of Creek County, Oklahoma.

Fourth. The jurisdiction of the County Court of Creek County, Oklahoma, exercising probate jurisdiction, to enter an order concerning an oil and gas lease executed in violation of and contrary to the laws of Oklahoma.

Fifth. The rule governing a plea or defense of estoppel in the courts of Oklahoma by virtue of the laws of that state and decisions of the Supreme Court of Oklahoma governing that subject.

We respectfully submit that the only question involving federal laws and the federal constitution passed upon and decided by that court was the contention made and which is answered by the court as follows:

"It is insisted that in *Markham v. Dugger*, 34 Okla. 492, 126 Pac. 190, the court held that such a judgment as was rendered by the District Court of Creek County in the action between Marshall and Arnold and others is valid, and the Tidal Oil Company, having acquired its leases subsequent to this decision, had a right to rely upon the rule as announced in the case; that a rule of property was established by the decision. We have examined the case of *Markham v. Dugger*, and we do not believe it sustains the contention made by counsel for the plaintiffs in error. Commissioner AMES, speaking for the court in *Markham v. Dugger*, *supra*, said: 'There is no dispute about the court having had jurisdiction of the persons of both parties. There is no dispute about the court having had jurisdiction of the subject-matter.'

* * * * *

"It is clear no question of jurisdiction was raised in the case. This court is committed to the rule that no rule of property may exist to render valid conveyances made in violation of a statute or of a governmental policy. *Gannon v. Johnston, et al.*, 40 Okla. 695, 140 Pac. 430, Ann. Cas. 1915D, 522; *Id.*, 243 U. S. 108, 37 Sup. Ct. 330, 71 L. ed. 625."

Petitioners have heretofore been allowed a writ of error to this court in this case which, if sustained by this court as properly taken by virtue of the Act of Congress of February 17th, 1922, amending section 237 of the Judicial Code, will bring before this court for decision the "rule of property" contention made by petitioners in their petition for writ of *cer-*

tiorari and their brief in support thereof. If this court holds that this case is such an action upon contract that the decision is reviewable by this court upon writ of error under said Act of February 17, 1922, there will be no occasion for the allowance of the writ of *certiorari* herein.

Respondents, therefore, respectfully urge that the petition and transcript of record attached thereto, show no grounds for the issuance of a writ of *certiorari* therein.

Respectfully submitted,

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We hereby acknowledge service of a copy of the foregoing brief of respondent, this the 12th day of February, 1923.

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